

FCC MAIL SECTION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
JUL 0 10 1996 Washington, D.C. 20554

FCC 96M-168

61716

In the Matter of )  
SOUTHWESTERN BROADCASTING CORPORATION )  
For Renewal of License )  
for Station KLZK (FM) )  
Brownfield, Texas )  
MM DOCKET NO. 96-104  
File No. BRH-900315UC

O R D E R

Issued: June 28 1996

; Released: July 1, 1996

At the first Prehearing Conference held on June 6, 1996, the parties agreed to negotiate the terms of a Consent Order which would result in the renewal of the license of Southwestern Broadcasting Corporation ("Southwestern"). See Order FCC 96M-151, released June 10, 1996. The ability to grant renewal by February 9, 1997, when silent station licenses will be cancelled by operation of law under the 1996 Telecommunications Act, was conditioned on the Bureau expediting an engineering amendment that was filed by Southwestern on May 7 1996, after the designation of this case for hearing. The Bureau agreed to cooperate in expediting the amendment. (Tr. 16.)

Two weeks later, on June 21, 1996, the Bureau filed a Motion For Further Prehearing Conference which it asked to be expedited:

to clarify on the record its position with regard to the processing of applications for modification of engineering proposals submitted by licensees after they have been designated for hearing because of their silent status.

Southwestern agreed to participate in such conference on short notice. The Presiding Judge held it on the date agreed, June 27, 1996.<sup>1</sup> Order FCC 96M-166, released June 26, 1996.

The Bureau relies on a policy quoted above, apparently established after June 6, that prohibits the expedited processing of Southwestern's modification application because it was filed after this case was designated for hearing.<sup>2</sup> The written policy which the Bureau relied on in the June 6 Conference is reported in Public Notice, Procedures Announced For Expedited Processing Of Applications Filed By Silent Broadcast Stations (DA 96-818) released May 22, 1996. There seems to be a tension if not a contradiction

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<sup>1</sup> The requirement to submit a Status Report on June 28, 1996, is cancelled. Cf. Order FCC 96M-151, supra.

<sup>2</sup> At the June 6th Conference, the Bureau flagged the post hearing timing as a distinguishing feature which made this case "unique." (Tr. 15.)

in the two policies. The Public Notice expressly contemplates the use of "expedited processing procedures." It does not contain the Bureau's language quoted above. Rather, it specifically represents that the Bureau staff "will use its best efforts to act on applications timely." Id. Timely expedited action on Southwestern's application would be consistent with the universally acknowledged "main issue which is the most expeditious resumption of services." (Tr. 8.)

The Hearing Designation Order (DA 96-657) ("HDO"), released April 29, 1996, states that no application had been made for an upgrade which Southwestern had undertaken to file. Therefore:

[t]he licensee's failure to return the station to the air since it acquired the facility almost six years ago raises substantial questions as to its capability and intent to resume broadcast operations.

Southwestern asserted on June 6th that:

[Southwestern] never had an opportunity to put the station on the air [because] [t]here was never a frequency that [it] could operate on during the entire time ....

(Tr. 17.) Southwestern was assigned the burden of proceeding and the burden of proof to determine whether it can expeditiously return to the air, whether it has violated the rules against silent stations, and whether or not its license renewal is in the public interest. Id. at 3. The HDO further orders that any renewal grant be conditioned on the "expeditious resumption of operation, the precise period of time to be established in the hearing." Id.<sup>3</sup> Therefore, Southwestern is fully advised as to what it must show. But it needs cooperation from the Bureau's processing line to meet the recently enacted statutory deadline.

Recognizing the dilemma, the Bureau initially committed itself to "taking special steps to assist broadcasters who have found themselves in this situation without regard to the reasons why." (Tr. 19.) The Bureau also concluded that Southwestern falls into the category for such expedited processing. (Tr. 13) But in light of the Bureau's change of position since June 6, there will be no further negotiation of a Consent Order. The Bureau reversed itself and now takes the position that in light of its recently articulated policy against expediting Southwestern's post designation request for an upgrade and the controlling statutory deadline of February 9, 1997, it will not be possible for Southwestern to bring Station KLZK(FM) back on the air.

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<sup>3</sup> Since the discussions in both Prehearing Conferences were focused on the statutory deadline of February 9, 1997, that will be the defining time frame prescribed in this hearing for fulfilling the condition.

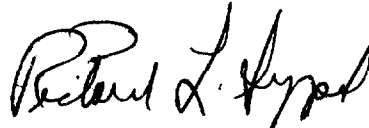
Southwestern will be permitted to proceed by Motion For Summary Decision. See 47 C.F.R. §1.251. The Bureau will file a Comment or Opposition in response to Southwestern's Motion For Summary Decision.<sup>4</sup> Since Southwestern desires an initial determination of the issues set in the HDO which assures the right to a hearing that allows time for an appeal, this case will go forward on an expedited schedule as agreed to by the parties.

Accordingly, IT IS ORDERED that Southwestern Broadcasting Corporation SHALL FILE a Motion For Summary Decision by July 3, 1996.<sup>5</sup>

IT IS FURTHER ORDERED that the Mass Media Bureau SHALL FILE by July 5, 1996, a Memorandum of Law and Policy which sets forth with precision the policy of the Bureau that now precludes an expedited processing of the pending Southwestern application for an upgrade and that has resulted in the Bureau's need to "clarify" its position in accordance with its Motion For Further Prehearing Conference.<sup>6</sup>

IT IS FURTHER ORDERED that the Mass Media Bureau SHALL FILE a Comment or an Opposition to Southwestern's Motion For Summary Decision by July 17, 1996.<sup>7</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>4</sup> The Bureau committed on June 6 to support a motion for summary decision if it is "well-grounded." (Tr. 5.)

<sup>5</sup> If it is impracticable to file on July 3, Southwestern may file on July 5, 1996, in which case the response time for the Bureau would be extended to July 19, 1996. However, both parties are urged to file at the earliest dates practicable.

<sup>6</sup> The Memorandum should track and analyze the precise language of the Public Notice (DA 96-818) which precludes the Bureau from expediting Southwestern's post designation application for a new engineering proposal. See HDO Para. 4 and fn. 4. The Bureau also shall square this policy with the acknowledged "main issue" which is to support the "most expeditious resumption of service" (Tr. 8) and the commitment in the Public Notice that "[t]he staff will use its best efforts to act on applications timely."

<sup>7</sup> A copy of this Order was faxed to counsel on date of issuance.